UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NEW ENGLAND HEALTH CARE
EMPLOYEES UNION, DISTRICT 1199,
Plaintiffs,

v. Civil Action No. 00-249T

RHODE ISLAND LEGAL SERVICES,
Defendants.

MEMORANDUM AND ORDER

Introduction

New England Health Care Employees Union, District 1199 (the "Union") brought this action, pursuant to 29 U.S.C. 185, to vacate an arbitrator's award that determined that a grievance regarding the termination of one of the Union's members was non-arbitrable. The Union and Rhode Island Legal Services ("RILS" or the "Employer") have filed cross motions for summary judgment.

The issue presented is whether a collective bargaining agreement ("CBA") provision that excludes from arbitration disputes that are pending before administrative or judicial agencies violates the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12203, and/or the Rhode Island Fair Employment Practices Act ("FEPA"), R. I. Gen. Laws § 28-5-7.

Because I answer that question in the negative, the Employer's motion for summary judgment is GRANTED, and the Union's motion for summary judgment is DENIED.

Facts

The parties have stipulated the relevant facts to be as follows. Valerie Fitzhugh ("Fitzhugh") was an employee of RILS and a member of the collective bargaining unit represented by the Union. On April 5, 1999, RILS terminated Fitzhugh, and the Union filed a grievance on Fitzhugh's behalf, pursuant to the provisions of the CBA between RILS and the Union. Before the grievance reached the arbitration stage, Fitzhugh filed a complaint with the Rhode Island Human Rights Commission ("RIHRC") and the U.S. Equal Employment Opportunity Commission ("EEOC") alleging that RILS terminated her because she was physically disabled. An arbitrator made an award denying the grievance on the ground that Article 20.3(f) of the CBA provides that: "RILS shall not be required to arbitrate any dispute which is pending before any administrative or judicial agency."

The Union argues that precluding arbitration of a grievance on the ground that it is the subject of a disability discrimination claim pending before an administrative or judicial tribunal violates the ADA and FEPA because(1) it is discriminatory, (2) it amounts to retaliation for filing such claims, (3) it is contrary to those statutes' underlying policy of encouraging employees to seek redress for discrimination.

Standard of Review

Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Smith v. O'Connell, 997 F. Supp. 226, 233 (D.R.I. 1998). Since the parties have stipulated to the all of the material facts, the Court's task is to determine which party is entitled to judgment, as a matter of law.

Analysis

I. Enforcement of Arbitration Awards Generally

When a dispute is submitted to arbitration pursuant to a CBA, the arbitrator is obliged to apply the provisions of the agreement. Eastern Assoc. Coal Corp. v. United Mine Workers, 121 S. Ct. 462, 466 (2000); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement."). As long as "the arbitrator's award 'draws its essence from the collective bargaining agreement,'", a court has limited authority to overturn the arbitration award. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (quoting Enterprise Wheel, 363 U.S. at 597). See also Teamsters Local Union No. 42 v. Supervalu, Inc., 212 F.3d 59, 61 (1st Cir. 2000). A court may not reject an award or reconsider

it on the merits simply because the Court disagrees. See Misco, 484 U.S. at 38.

In this case, it is undisputed that the arbitrator faithfully applied Article 20.3(f) of the CBA precisely as it is written. As already noted, that section expressly precludes arbitration of "any dispute which is pending before any administrative or judicial agency." Moreover, there is no question that, at the time of arbitration, Fitzhugh's discrimination claim was pending before the EEOC and the RIHRC. However, the Union contends that Article 20.3(f) violates the prohibitions against discrimination and retaliation contained in the ADA and the FEPA, and the public policy underlying those statutes.

II. The Discrimination Claim

In order to establish that Article 20.3(f) discriminates against disabled employees, the Union must show that it treats disabled employees differently from similarly situated employees without disabilities. Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 252 (1st Cir. 2000). However, on its face, Article 20.3(f) applies to every grievance that is the subject of a pending claim before a state or federal administrative or judicial agency without regard to the nature of the claim, or whether the employee is or is not disabled. Therefore, there is

no basis for the Union's contention that Article 20.3(f) discriminates against disabled employees.

III. The Retaliation Claim

Both the ADA and the FEPA make it unlawful for an employer to retaliate against an employee for making a claim of discrimination. See 42 U.S.C. § 12203(a); R.I. Gen. Laws 28-5-7(5). In order to determine whether retaliation has been proven, the familiar burden shifting rules utilized in cases alleging other forms of disparate treatment employment discrimination are applied.[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); White v. New Hampshire Dep't of Commerce, 221 F.3d 254, 264 (1st Cir. 2000) (applying McDonnell Douglas-Burdine analysis to retaliation claim). The plaintiff, first, must make out a prima facie case by showing that (1) the plaintiff engaged in a protected activity, (2) the plaintiff suffered an adverse employment action, and (3) there is a causal connection between the adverse employment action and the protected activity. Oliveras-Sifre v. Puerto Rico Dept. of Health, 214 F.3d 23, 26 (1st Cir. 2000). The burden then shifts to the employer to articulate some legitimate, non-retaliatory reason for the

[1] This analysis also applies to FEPA cases. See Tardie v. Rehabilitation Hospital, 6 F. Supp. 2d 125, 133 (D.R.I. 1998) (using Title VII analysis to apply FEPA in disability discrimination case).

adverse employment action. Hodgens v. General Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998). If the employer meets its burden of production, the plaintiff must demonstrate that the proferred reason was merely a pretext for retaliation. Id. at 161.

There is no question that, in filing a charge of disability discrimination with the EEOC and the RIHRC, Fitzhugh engaged in a protected activity. However, the Union is unable to demonstrate any causal connection between the filing of that charge and Fitzhugh's termination. On the contrary, the fact that Fitzhugh's termination preceded the filing of her discrimination charge compels the conclusion that she was not terminated in retaliation for filing that charge.

Nor is there any merit to the argument that the CBA provision precluding arbitration of claims that are pending before administrative or judicial tribunals constitutes what can only be described, oxymoronically, as some form of anticipatory retaliation. That argument presupposes that Fitzhugh had a right to arbitrate her grievance. However, the CBA expressly precludes arbitration of such grievances and neither the ADA nor the FEPA confers such a right.

In addition, RILS has articulated a legitimate non-discriminatory reasons for Article 20.3(f); namely, to prevent the wasteful duplication of effort and the risk of inconsistent

results that is inherent in simultaneously defending the same claim in two fora. The Union has failed to present any evidence even suggesting that the proffered reason is a pretext for retaliation. See Champagne v. Servistar Corp., 138 F.3d 7, 13 (1st Cir. 1998) (affirming summary judgment for defendant in ADA case when plaintiff unable to present any evidence to rebut defendant's non-retaliatory reason for adverse employment action).

Finally, even if a right to arbitrate matters that are the subject of other proceedings existed, and the loss of that right could be characterized as adverse employment action, the retaliation claim fails because there is no basis for inferring that Article 20.3(f) was prompted by any discriminatory purpose. On the contrary, the provision is contained in a CBA negotiated at arms length, between RILS and the Union itself. Consistent with the National Labor Relations Act's policy of deferring to the collective bargaining process as a means of resolving workplace disputes, see 29 U.S.C. § 151, courts, properly, are hesitant to invalidate provisions of a CBA without good reason. That is especially true when the provision is attacked by one of the parties that negotiated it.

IV. Public Policy

It is hornbook law that contracts that violate public policy are not enforceable. See Restatement (Second) of Contracts § 178

(1981). Moreover, "Collective bargaining agreements are simply a species of contracts and, as such, are not immune from the operation of this rule." Exxon Corp. v. Esso Workers' Union, 118 F.3d 841, 844-45 (1st Cir. 1997).

However, CBAs are not invalidated lightly. There must be a showing that the agreement "violates some explicit public policy," that is "well defined and dominant." W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 765 (1983). The Union is unable to identify any explicit, well defined, and dominant public policy that would be served by allowing an employee to simultaneously pursue such a claim in multiple fora.

Furthermore, in order to achieve its goals of preventing disability discrimination and providing redress when such discrimination occurs, the ADA and FEPA establish a comprehensive scheme that describes the conduct that is prohibited, creates procedures for dealing with alleged violations, and provides remedies for aggrieved employees. The Union does not challenge the effectiveness of these statutes. Nor does it explain why superimposing an arbitration requirement is necessary to achieve their purpose.

At oral argument, the Union, for the first time, contended that Article 20.3(f) amounts to retaliation, not only against

Fitzhugh, but also against the Union itself. This argument fails for two reasons.

First, Local Rules 12(a)(1) and 12(a)(2) require that memoranda filed in support of, and in opposition to, motions set forth the reasoning and authorities supporting the motion or opposition. Because this argument was not made in the Union's memorandum in support of its motion for summary judgment or its memorandum in opposition to RILS's motion for summary judgment, the argument is deemed to have been waived.

In any event, the argument lacks merit. The Union is not "disabled." Any claim of disability discrimination that it may assert in this case is necessarily derivative of Fitzhugh's claim and, as already noted, Fitzhugh has no such claim. Moreover, as noted previously, the challenged provision was negotiated by and agreed to by the Union itself.

Conclusion

For all of the foregoing reasons, the Union's motion for summary judgment is DENIED, and RILS's motion for summary judgment is GRANTED.

By Order,

_____
Deputy Clerk

ENTER:

_____
Ernest C. Torres
Chief United States District Judge
Date: , 2001